Local Union No. 56, Pile Drivers, Bridge, Wharf, Dock Carpenters, Welders, Burners, Divers of Massachusetts a/w United Brotherhood of Carpenters and Joiners of America, AFL-CIO[1] *and* **Jeremiah Sullivan Sons, Inc. and Massachusetts Laborers District Council.** Cases 1-CD-700 and 1-CD-701

8 March 1984

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

The charge in this Section 10(k) proceeding was filed on 28 July 1983 by the Employer and on 1 August 1983 by Massachusetts Laborers District Council (Laborers), alleging that the Respondent, Local Union No. 56, Pile Drivers, Bridge, Wharf, Dock Carpenters, Welders, Burners, Divers of Massachusetts a/w United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Pile Drivers), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Laborers. The hearing was held 23 September 1983 before Hearing Officer Joseph F. Griffin.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, a Massachusetts corporation, is engaged as a general excavation and grading contractor located in Everett, Massachusetts. It annually receives at its construction sites within the Commonwealth of Massachusetts goods and materials valued in excess of $50,000 directly from points located outside the Commonwealth of Massachusetts. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Pile Drivers and Laborers are labor organizations within the meaning of Section 2(5) of the Act.

[1] The name of this Union appears as amended at the hearing.

II. THE DISPUTE

A. *Background and Facts of Dispute*

The Employer is an excavating and grading contractor responsible for the bracing of exterior embankments by constructing wooden walls supported by steel H beams, or lagging, for the Charles Square Project in Cambridge, Massachusetts. During July 1983,[2] the Employer's president and Pile Drivers' business agent, MacDonald, had phone conversations concerning the assignment of the lagging work on the Charles Square project. During a conversation on 25 July, MacDonald claimed the work in dispute and rejected a compromise with the Employer and Laborers. In response to the statement of the Employer's president that he would give the work to employees represented by Laborers, MacDonald stated that "he would do what he had to do"; when asked if all pile drivers would be sick, MacDonald responded affirmatively. The Respondent commenced leafletting at the jobsite on 28 July, the morning that Laborers began the lagging work. Their leafletting lasted 3-4 days and caused carpenters employed by a secondary employer to cease work. In a letter addressed to the Board, dated 5 August, Pile Drivers disclaimed interest in the lagging work at the Charles Square project, although the work in dispute was close to completion.[3] At the hearing, Pile Drivers reiterated its disclaimer.

B. *Work in Dispute*

The disputed work involves lagging work, namely the bracing of exterior embankments by constructing a wooden wall supported by steel H beams at the Charles Square project in Cambridge, Massachusetts.

C. *Contentions of the Parties*

The Employer contends that reasonable cause exists to believe that Pile Drivers has violated Section 8(b)(4)(D) of the Act. It argues that Pile Drivers' letter dated 5 August does not constitute an effective disclaimer considering the history of illegal coercion by Pile Drivers and the fact that the disclaimer was dated when the work was almost completed. It contends that the work in dispute should be awarded to employees represented by Laborers based on its collective-bargaining agreement with Laborers; employer past practice; relative skills, economy, efficiency, and safety of operations; and

[2] All dates herein refer to 1983 unless otherwise specified.

[3] The Employer's president testified that the disputed work would take 7-1/2 working days. The Employer, in its brief, noted that 5 August was the seventh day of work. Therefore the job was only one-half working day from completion.

employer preference. The Employer further argues that any award of the disputed work by the Board should be extended to all of the Employer's present and future jobsites in the geographical jurisdiction of Pile Drivers.

At the hearing, Laborers took the position that employees represented by it should be awarded the disputed work on the basis of safety and economy.

Pile Drivers contends that there is no reasonable cause to believe that it has violated Section 8(b)(4)(D) of the Act because it disclaimed interest in the disputed work and has not acted inconsistently with its disclaimer. Pile Drivers argues that issuance of a broad order by the Board would be inappropriate because the Pile Drivers has neither threatened to continue picketing, nor continued to demand the disputed work. Pile Drivers argues further that there is no substantial likelihood that the dispute will recur.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

As noted above, it is undisputed that Pile Drivers' business agent, MacDonald, claimed the disputed work, responded affirmatively to Employer's president's question whether all pile drivers would be sick upon assignment of the work to Laborers, and passed out leaflets at the jobsite for 3–4 days causing carpenters employed by a secondary employer to cease work. However, in a letter dated 5 August, Pile Drivers purportedly disclaimed interest in the disputed work. At the hearing, Pile Drivers' counsel reiterated its disclaimer of the disputed work.

Although the Board has stated that an effective renunciation of the work in dispute resolves the jurisdictional dispute,[4] it has also found that a hollow disclaimer given for the purpose of avoiding an authoritative decision on the merits cannot be given effect.[5] In the present case, as noted above, Pile Drivers did not disclaim the work until the work was almost completed, the disclaimer occurred immediately after the charges were filed,[6] and the Employer presented undisputed testimony that Pile Drivers had threatened to picket or did picket the Employer's project in July 1980, September 1981, May 1982, and November 1982 over lagging work.

Based on the foregoing, we find that Pile Drivers has presented a hollow disclaimer and was seeking merely to escape the consequences of its unlawful action. Therefore, we find that reasonable cause exists to believe Section 8(b)(4)(D) has been violated and that it will effectuate the policies underlying Section 10(k) and Section 8(b)(4)(D) of the Act for us to determine the merits of the dispute. No party contends, and the record contains no evidence showing, that there exists an agreed-upon method for the voluntary adjustment of this dispute. Accordingly, we find that the dispute is properly before the Board for determination under Section 10(k) of the Act.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certifications and collective-bargaining agreements

Neither of the labor organizations involved in this dispute has been certified by the Board as the collective-bargaining representative of the Employer's employees in an appropriate unit. However, the Employer currently has a collective-bargaining agreement with Laborers which covers all "Laborers' work . . . in connection with lagging." We find that the collective-bargaining agreement is sufficient to cover the work in dispute. The Employer has no collective-bargaining agreement with Pile Drivers. We therefore find that the factor of collective-bargaining agreements favors an award of the disputed work to the Employer's employees represented by Laborers.

2. Employer preference and past practice

It is undisputed that the employees represented by Laborers have done a majority of the lagging work in the past 10 years for the Employer and are presently assigned the disputed work. We find that the Employer's assignment and practice favors an award to its employees represented by Laborers.

---

[4] *Laborers Local 66 (Georgia-Pacific Corp.)*, 209 NLRB 611 (1974); *Sheet Metal Workers Local 55 (Gilbert L. Phillips, Inc.)*, 213 NLRB 479 (1974).

[5] *Laborers Local 910 (Brockway Glass Co.)*, 226 NLRB 142 (1976).

[6] The notices of charges filed were dated 29 July and 1 August 1983.

The Employer, at the hearing and in its brief, has expressed its preference that the disputed work continue to be performed by its employees represented by Laborers. While we do not afford controlling weight to this factor, we find that it favors an award of the work in dispute to employees represented by Laborers.

3. Area and industry practice

The Employer presented testimony from a large number of employers in the Greater Boston area who assign lagging work to laborers. The Employer's president, however, testified that pile drivers do lagging work for other employers in the area. Accordingly, we find that the factor of area practice is inconclusive.

4. Relative skills

The Employer's president testified that employees represented by Laborers possess the requisite skills to perform the work in dispute. The record indicates that pile drivers perform the disputed work for other area employers. Therefore we find that the factor of relative skills is not helpful to our determination.

5. Economy and efficiency of operations

Laborers presented the testimony of the Employer's president that assigning the disputed work to pile drivers would result in a congested and dangerous work area, loss of time, and increased likelihood of employee injury. The employees represented by Laborers in performing the lagging work remove the soil from around the system used to support the lagging, install the lagging, then move back in to pack soil around the newly installed lagging before excavating the next work area. Pile drivers, in contrast to laborers, do not shovel the earth from around the lagging, which is a necessary part of the installation. Therefore, if the disputed work were awarded to pile drivers, when the earth collapsed in the area around the lagging work during the installation process, pile drivers would have to move out and laborers move in to remove the soil before pile drivers would move back in to complete the lagging installation. As a result, one group of employees would stand idle while the other group works.

Pile Drivers has not shown that an award of the work to employees represented by it would be as economical and/or result in the same flexibility in adjusting to changing work duties as an award of the work to employees represented by Laborers.

Accordingly, we find that the factors of economy, efficiency, and safety of operations favor an award of the disputed work to the employees represented by Laborers.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Laborers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements; employer practice, assignment and preference; and economy, efficiency, and safety of operations. In making this determination, we are awarding the work to employees represented by Laborers, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

Scope of Determination

The Employer requests that the Board issue a broad work award on behalf of the employees represented by Laborers to be applicable throughout the Pile Drivers' territorial jurisdiction. The Employer contends that such an order is necessary in order to avoid further jurisdictional work interruptions in the areas where it operates. In this respect, the Employer claims that it has been a target of jurisdictional disputes in every major excavation it has completed in the last 3 years. However, there has been no continuing demand for future similar work by Pile Drivers and we are not satisfied that the record is sufficient to demonstrate the likelihood that Pile Drivers will again resort to unlawful means to obtain assignment of the work in dispute. Therefore, we find that the issuance of the broad order sought herein by the Employer is not warranted in this case, and limit our present determination to the particular controversy which gave rise to this proceeding.[7]

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Jeremiah Sullivan Sons, Inc. represented by Massachusetts Laborers District Council are entitled to perform the lagging work, namely, bracing of exterior embankments by constructing a wooden wall supported by steel H beams at the Charles Square project in Cambridge, Massachusetts.

2. Local Union No. 56, Pile Drivers, Bridge, Wharf, Dock Carpenters, Welders, Burners, Divers of Massachusetts a/w United Brotherhood of Car-

[7] See generally *Woodworkers Local 3-90 (Crown Zellerbach Corp.)*, 261 NLRB 615 (1982); *Iron Workers, Local 3 (Spancrete Northeast)*, 243 NLRB 467 (1972). Chairman Dotson would grant the broad work award requested by the Employer.

penters and Joiners of America, AFL-CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Jeremiah Sullivan Sons, Inc. to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Local Union No. 56, Pile Drivers, Bridge, Wharf, Dock Carpenters, Welders, Burners, Divers of Massachusetts a/w United Brotherhood of Carpenters and Joiners of America, AFL-CIO, shall notify the Regional Director for Region 1 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.